

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

PROASSURANCE INDEMNITY
COMPANY, INC.,

Plaintiff,

vs.

DONALD J. WAGONER,
MARILYN L. WAGONER,
WAGONER MEDICAL CENTER, LLC,
WAGONER MEDICAL CENTER, P.C.,
D.J. & M.L. WAGONER, INC.,
ROBERT A. BREWER,
WILLIAM G. TERPSTRA,
GARY M. HARTMAN,
THOMAS K. HEWITT,
JOHN M. THOMAS,
STEPHEN ROBERTSON as the
Administrator of the Indiana Patient's
Compensation Fund,
LINDA S. RICHARDS LPN,

Defendants.

STEPHEN ROBERTSON as the
Administrator of the Indiana Patient's
Compensation Fund,

Cross Claimant,

vs.

ROBERT A. BREWER,
D.J. & M.L. WAGONER, INC.,
GARY M. HARTMAN,
THOMAS K. HEWITT,
WILLIAM G. TERPSTRA,
JOHN M. THOMAS,
DONALD J. WAGONER,
MARILYN L. WAGONER,
WAGONER MEDICAL CENTER, LLC,

No. 1:15-cv-01389-JMS-DKL

Cross Defendants.

ORDER

as to *pro se* Defendant Thomas K. Hewitt. [\[Filing No. 59.\]](#) Plaintiff appeared by counsel Brett Clayton. Mr. Hewitt appeared on his own behalf in person. The other parties were not required to attend. [\[Filing No. 65.\]](#) The Court Reporter was Jean Knepley.

Rule 55 of the Federal Rules of Civil Procedure sets forth a two-step process for a party seeking default judgment. *McCarthy v. Fuller*, 2009 WL 3617740, at *1 (S.D. Ind. 2009); *see also* *Lowe v. McGraw-Hill Companies, Inc.*, 361 F.3d 335, 339 (7th Cir. 2004) (“The Federal Rules of Civil Procedure make a clear distinction between the entry of default and the entry of a default judgment.”). First, the plaintiff must obtain an entry of default from the Clerk. Fed. R. Civ. Pro. 55(a). Second, after obtaining that entry, the plaintiff may seek an entry of default judgment. Fed. R. Civ. Pro. 55(b). The plaintiff “is not permitted to bypass the necessary step of obtaining an entry of default” before seeking an entry of default judgment. *Golub v. United States Secret Serv.*, 2009 U.S. Dist. LEXIS 76756, *2-3 (S.D. Ind. 2009).

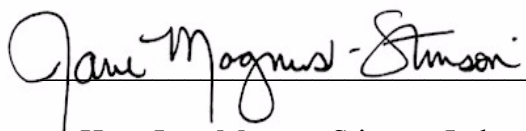
Plaintiff confirmed that it has not moved for a Clerk’s entry of default pursuant to Federal Rule of Civil Procedure 55(a). Additionally, the Seventh Circuit Court of Appeals has instructed district courts not to enter default judgment against a *pro se* defendant who appeared at a default hearing unless it is clear that the *pro se* defendant has “exhibited a willful refusal to litigate the case properly.” *Comerica Bank v. Esposito*, 215 Fed. Appx. 506, 508 (7th Cir. 2007). Although Mr. Hewitt attempted to answer Plaintiff’s Complaint by mailing his response to Plaintiff’s counsel

instead of filing it with the Court, as he should have done, the Court finds that he has not shown a willful refusal to litigate this case properly.

For these reasons, the Court **DENIED** Plaintiff's Motion for Default Judgment. [[Filing No. 59.](#)] The Court **ORDERED** Mr. Hewitt to file an Answer to Plaintiff's Complaint with the Court within **10 days**. Mr. Hewitt was directed to the Clerk's Office for further directions and also may find helpful information on the Court's website at <http://www.insd.uscourts.gov/filing-without-attorney>. Mr. Hewitt was also cautioned that neither the Court nor the Clerk's office can offer him legal advice should he continue to proceed *pro se*.

As a final matter, the Court notes that although a crossclaim filed in this case references Mr. Hewitt, [[Filing No. 54 at 5-6](#)], Mr. Hewitt is not listed on the service distribution list of that filing, [[Filing No. 54 at 8](#)]. Federal Rule of Civil Procedure 5(a)(1)(B) provides that a pleading after the original complaint must be served on every party unless the Court has otherwise ruled, which it has not in this case. Thus, the Court directs the Clerk to **REMOVE** Mr. Hewitt as a Crossclaim-Defendant listed on the Court's docket until such time as Crossclaim-Plaintiff Stephen Robertson, Commissioner of the Indiana Department of Insurance and Administrator of the Indiana Patient's Compensation Fund, demonstrates proper service upon Mr. Hewitt. The Court reminds all parties that given Mr. Hewitt's *pro se* status, they are expected to serve him with filings via U.S. Mail at the address listed in the distribution list of this Order. Fed. R. Civ. Pro. 5(b)(2)(C). Mr. Hewitt may consent in writing to service via electronic means if he chooses, but he is under no obligation to do so. Fed. R. Civ. Pro. 5(b)(2)(E).

Date: January 19, 2016


Hon. Jane Magnus-Stinson, Judge
United States District Court
Southern District of Indiana

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